

BOARD OF APPEALS
FOR
MONTGOMERY COUNTY

Stella B. Warner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. S-1943-B

PETITION OF KEVIN SON AND NEW PRESS FOR SUCCESS, INC.

OPINION OF THE BOARD
(Hearing held on January 23, 2002)
(Effective Date of Opinion: March 1, 2002)

This proceeding is a petition pursuant to Section 59-G-2.13(c) of the Montgomery County Zoning Ordinance (Chapter 59, Mont. Co. Code 1994, as amended) for a modification to an existing special exception granted pursuant to Section 59-G-2.45 (Recreational or entertainment establishments, commercial). The Petitioner requests a modification to permit the sale of beer, wine and alcohol and to permit the upgrade of the kitchen to a commercial restaurant standard.

Martin J. Hutt, Esquire, represented the petitioner, Kevin Son and New Press for Success, Inc. Testifying in support of the special exception modification was Kevin Son, the co-applicant.

The subject property is Lot 36, Block B, Montgomery County Airpark Industrial Site Subdivision, located at 18925 Earhart Court, Gaithersburg, Maryland, in the I-4 Zone.

Decision of the Board: Modification of the Special Exception **GRANTED**,
subject to conditions enumerated below.

EVIDENCE PRESENTED

1. The Applicant, Kevin Son and New Press for Success, Inc. have owned and operated a billiard parlor at the site since February 2001. Special Exception S-1943 was granted in August, 1992, permitting a billiard parlor, including food service limited to snacks and a microwave and free standing units to heat food. The Special Exception has been modified several times in 1998 and 2001 (Resolution dated April 7, 1998, approval to sell beer, on site; Resolution dated July 25, 2001, transfer of special exception).
2. The Applicant requests permission to sell beer, wine and alcohol on the subject premises and to upgrade kitchen facilities to a commercial restaurant standard to accommodate its customers without adversely impacting neighboring uses.
3. The billiard parlor is composed of 5,100 square feet, located on the ground floor of a commercial center of 27,900 square feet. The center is located at the end of Earhart Court that intersects with Snouffer School Road to the south opposite Flower Hill Way. [Exhibit No. 14].
4. The surrounding land uses contain light industrial and commercial uses in the I-4 zone. Adjoining the subject property to the north, east and west are warehouse and self storage facilities. Adjoining to the south are several commercial uses including a convenience store

and automobile service station. Further to the south, across Snouffer School Road is the Flower Hill residential community. [Exhibit No. 14].

5. The petitioner requested this modification to existing special exception S-1943 in order to implement a liquor license, approved by the Board of License Commissioners on August 16, 2001, permitting the sale of beer, wine and alcohol on the premises and to upgrade the existing kitchen to meet the requests of customers and to better compete with similar establishments located in Gaithersburg and Rockville.

6. The Applicant proposes to make changes and renovations to the billiard parlor to cater to customers' eating and drinking preferences. The Applicant proposes the sale of beer, wine and alcohol on the premises to meet the requests of customers and to compete with the other billiard parlors in the area that serve beer, wine and liquor. The modification to permit a more expansive kitchen also is to meet customer requests and to be more competitive.

7. A traffic study is not required to satisfy Local Area Transportation Review to determine the adequacy of public facilities because there are no transportation issues associated with the modification. See M-NCPPC Staff Recommendation, [Exhibit No. 17].

8. The modification is exempt from the Montgomery County forest conservation requirements of Chapter 22A because it involves an existing structure and does not result in any clearing or grading. See M-NCPPC Staff Recommendation, [Exhibit No. 17].

9. The Technical Staff of the Montgomery County Planning Board recommended approval of the proposed modification S-1943-B with conditions. See M-NCPPC Staff Recommendation, [Exhibit No. 17].

FINDINGS OF THE BOARD

Based on the binding testimony and the exhibits of record, the Board finds that be granted.

Sec. 59-G-1.2. Conditions for granting.

59-G-1.2.1. Standard for evaluation. A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.

The inherent and non-inherent effects of the billiard parlor have been established by the existence of the previously approved special exception. Furthermore, this use has been operated at the existing site for more than nine (9) years and the proposed

modification will not change the inherent effects of the use or its compatibility with the surrounding neighborhood

59-G-1.21. General conditions.

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

- (1) Is a permissible special exception in the zone .

The Board finds that the proposed special exception modification for a recreational or entertainment establishment, commercial is permissible in the I-4 zone.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

The Board finds that the proposed modification complies with the standards and requirements for a recreational or entertainment establishment, commercial found in Section 59-G-2.45.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan thereof adopted by the Commission. Any decision to grant or deny special exception must be consistent with an recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that the granting of a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

The Board finds that the proposed modification is consistent with the Gaithersburg Vicinity Master Plan.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions and number of similar uses.

The Board finds that the use as modified will not have a detrimental effect for any of these reasons.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site irrespective of any adverse effects the use might have if established elsewhere in the zone.

The Board finds that the proposed modification will not have a detrimental effect on the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

The Board finds that the proposed modified use will cause no objectionable noise, vibrations, fumes, odors, dust, glare or physical activity in accordance with Section 59-G-1.21(a)(6) of the Zoning Ordinance.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

The billiard parlor was approved by special exception in 1992 and remains the only special exception within the commercial center. The Board finds that the proposed use will not, when evaluated in conjunction with existing and approved special exceptions in the neighboring area, increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely, in accordance with Section 59-G-1.2 1 (a)(7)of the Zoning Ordinance.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

The Board finds that the billiard parlor has operated for about 10 years and the proposed modified use will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area, in accordance with Section 59-G-1.27(a)(8) of the Zoning Ordinance.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

The Board finds that the proposed use will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities, in accordance with Section 59-G- 1.21(a)(9) of the Zoning Ordinance. The Board finds that the sewer and water capacity for the proposed modification is sufficient.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.

The special exception is on a duly recorded lot. The Board finds that approval of a preliminary plan of subdivision is not required in this case.

- (ii) With regard to findings related to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

The Board finds that the proposal will not have a detrimental effect on the safety of vehicular or pedestrian traffic and that the public roads are adequate to accommodate the proposed use.

Sec. 59-G-2.45. Recreational or entertainment establishments, commercial.

A recreational or entertainment establishment of a commercial nature, such as a baseball, football or boxing stadium or arena, miniature golf course, golf or baseball driving range, a bowling alley, pool hall or billiard parlor, amusement centers, skateboard park, tennis court or swimming pool may be allowed; provided, that such use is not injurious to the surrounding area; and provided further that in the industrial zones recreational establishments will be located as to assure the safety of the users of the facilities.

The billiard parlor, as modified, will not be injurious to the surrounding area. The nature of the use remains substantially the same. There will be no change in the size or location of the use. There should be no impact on the safety of the users of the facility.

In the C-2 zone, recreational or entertainment establishments of a commercial nature, are limited to a baseball, football or boxing stadium or arena, swimming pool, miniature golf course, golf or baseball driving range, roller and ice skating rinks or amusement center, subject however, to the following requirements when located outdoors.

- (a) When such use abuts the side and/or rear line of a lot in any residential zone, a solid wall or substantial, solid fence at least 6 feet in height shall be constructed and maintained along such lot line.

Not applicable.

- (b) Lighting is not to reflect or cause glare into any residential zone.

Not applicable.

- (c) When such use occupies a corner lot, the ingress or egress driveways shall be located at least 20 feet from the intersection of the front and side street lines of the lot, and such driveways shall not exceed 25 feet in width. Driveway entrances and exits shall not be located directly across a street or alley from nor less than 8 feet from residential property.

Not applicable.

The Board finds that the use with the modification will not be injurious to the surrounding area. The Board restates that the granting of the modification will not adversely affect the safety of persons surrounding properties, or affect the general welfare of neighboring residents. The location of the facility in the industrial zone does not interfere with the safety of the patrons.

For all these reasons, the requested modification to permit the upgrade of the kitchen and to permit the sale of beer, wine and alcohol on the premises, is GRANTED, subject to the following conditions:

1. As required by Section 59-A-1.27, the holder of the special exception is bound by all of his testimony and exhibits of record, the testimony of his witnesses and representations of his attorneys, to the extent that such evidence and representations are identified in this Opinion and except as altered by compliance with the following conditions.
2. The modification is to permit the special exception holder to upgrade the kitchen and to sell beer, wine and alcohol on the premises only in accordance with the license issued by the Montgomery County Board of License Commissioners.
3. All other terms and conditions of the special exception, except as modified herein, remain in full force and effect.

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the opinion stated above be adopted as the resolution required by law as its decision on the above entitled petition.

On a Motion by Louise L. Mayer with Allison Ishihara Fultz, Angelo M. Caputo, Donna L. Barron, and Donald Spence, Chair, in agreement, the Board adopted the foregoing Resolution. All Board member have either attended the hearing or read the transcript and reviewed the record prior to participating in the foregoing resolution.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 1st day of March, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four month period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.